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IN THE

Supreme Court of the United States

October Term, 1966
No. 16

WILLIAM L. AUSTIN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

PETITION FOR REHEARING.

PETITIONER, COMMONWEALTH OF KENTUCKY, prays that a rehearing be granted of this Court's decision of May 8, 1967, reversing the judgment of the McCracken Circuit Court of McCracken County, entered in the above-entitled case on February 28, 1964, and that the case be ordered restored to the docket for argument at the next term of Court on Question 1 presented by the petition for certiorari which reads as follows:

1. Whether, consistent with the free speech and press provisions of the First Amendment and the due process requirements of the Fourteenth Amendment, as well as the constitutional standards for judging obscenity enunciated by decisions of the Supreme Court, the two publications involved in the prosecution herein upon which the judgment of conviction was rendered are entitled to constitutional protection.

The unusual procedural aspects of this case, as recited in Point I herein, make the petition for rehearing longer than would be expected in the usual case, in as much as the supporting reasons for the rehearing have not, as yet, been briefed or argued before the Court.

Reasons for Granting Rehearing and Restoring Case to Docket for Argument on Question 1.

I.

This Court's Opinion of May 8, 1967, Resolving a Major Question of Law Without Permitting the Commonwealth to Lend Advocacy by Way of Brief and Oral Argument in Support of Its Cause Is Basically Unfair and Is a Radical Departure From Appellate Procedures Heretofore Followed by This Court.

In its grant of certiorari on April 25, 1966, in *Austin v. Kentucky* and *Redrup v. N.Y.*, 16 L. Ed. 2d 438, this Court's order limited argument to the issue of scienter, although both Austin and Redrup had raised the obscenity vel non issue in their petitions. The same procedure was followed in *Gent v. Arkansas*, 16 L. Ed. 2d 537, but in that case the court, by a 6-3 vote, specifically denied certiorari on the obscenity vel non issue (questions 4-8) of the jurisdictional statement on appeal.

During oral argument on October 10, 1966, Justice Stewart who had voted with Justices Black and Douglas for grant of certiorari on all issues asked Assistant Attorney General John Browning during Kentucky's presentation if the case should not be reversed for failure of the trial court to instruct the jury properly on the issue of obscenity (*i.e.*, in failing to instruct the jury in terms of redeeming social importance). Assistant Attorney General Browning advised the Court

that because of the limited grant of certiorari, respondent had not taken time to brief and was not prepared to argue the other issues raised in the petition, whereupon Justice Clark remarked that from the limited grant of certiorari it must be *assumed* that the subject matter was obscene. From respondent's recollection, no member of the Court bothered to reply to Justice Clark's statement, nor was the obscenity vel non issue inquired into thereafter.

In its decision, seven months after the case was submitted,[1] seven members of this Court reversed the state court judgment on the very ground which was excluded from the writ of certiorari the court had granted to appellant, which ground, Justice Clark had stated on oral argument, was not open to dispute or oral argument. Further, in its earlier action in *Gent*, involving girlie magazines which did not approach the offensiveness of "Spree" and "High Heels", six members of this Court had specifically noted that such question was nonappealable and under its certiorari jurisdiction had *denied* certiorari.

On this record, we do not think it lacking in respect to join with Justices Harlan and Clark when they state (in dissent) "these dispositions do not reflect well on the processes of the Court, and I think the issues for which the cases were taken should be decided."

If legal briefing and argument is thought to serve a useful purpose (and we think it does)[2] then it would

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[1]The Wire Services drew particular attention to this time factor. "In doing so, however, the court gave the public a glimpse of its indecision on the subject—and indecision which delayed the cases nearly a year."

[2]On the importance of argument and briefing in cases before this Court, see Supreme Court Practice—Stern and Gressman,

(This footnote is continued on the next page)

seem that the May 8 opinion should be vacated and the cause restored to the docket for further briefing and argument on the major issues which have been raised thus far in the briefs and in the Court's opinion. For this and the other reasons stated herein, respondent seeks a rehearing.

II.

This Court's Per Curiam Opinion Is Ambiguous in That It Appears to Be in Conflict With the Rationale Expressed by a Majority of This Court in Mishkin and Ginzberg, Decided During the 1965 Term.

During the 1965 term, a majority of this Court held that the variable approach to obscenity was consistent with constitutional standards, and applied its rationale in interpreting the Federal Obscenity Postal Statute and the N.Y. Obscenity Statute. *Mishkin v. N.Y.*, 383 U.S. 502; *Ginzberg v. U.S.*, 383 U.S. 463 (March 21, 1966). For recent Appellate Court decisions supporting this construction see: *Bookcase, Inc. v. Broderick*, 18 N.Y. 2d 71, 73, 271 N.Y.S. 2d 947, 218 N.E. 2d 668; *New York v. Tannenbaum*, 18 N.Y. 2d 268, 274, ... N.Y.S. 2d 231 (Sept. 29, 1966); *Interstate Circuit, Inc. et al. v. City of Dallas*, 366 F. 2d 590, 596 (Aug. 30, 1966). See also: National Decency Reporter, published by Citizens for Decent Literature, Inc., June-July 1966, entitled "Analysis of the Mishkin, Ginzburg and Fanny Hill Decisions," at page 6 *et seq.*, wherein the authors remark:

> "Under the 'variable' obscenity approach, the term 'obscenity' as defined in Roth-Alberts functions in accordance with two variable factors: (1)

3rd Ed., at pages 352, 353, the authors concluding: "What has been said should be sufficient to show the inadvisability of submitting (without argument) if counsel wishes to do everything possible toward winning this case."

the nature of the materials, and (2) the use of the materials, i.e., the manner in which they are employed. . . ."

Notwithstanding the clear expressions in *Mishkin* and *Ginzburg* and the fact that the *per curiam* opinion in *Redrup-Austin-Gent* reaffirms that rationale through its citation of *Ginzburg,* the hodge podge created by treating together in one all-too-brief opinion (and failing to distinguish) a prior restraint case, which treats the *res* rather than conduct, and a criminal case, which deals only in conduct, coupled with the adverse results suffered by the prosecution in all three cases, creates an illusion that this Court has retreated to constant obscenity concepts.

Certainly the *per curiam* opinion provides fuel for such an argument and already the fires are lighted. Emmanuel Redfield, counsel in the *Gent* case, is reported in the New York Times of March 9, 1967 as saying:

> "This is the first time the Court has given its seal of approval to this type of material."

After noting that Mr. Redfield represented the publisher of "Gent", the article went on to state:

> "The two other 'girlie' magazines, High Heels and Spree, were named in a Paducah, Ky., case, and the two paperback books figured in a New York City case.
>
> Mr. Redfield said in a telephone interview that the Court's decision would protect the magazines from obscenity charges 'in any village in the land,' as long as future issues are similar in content."

It has been reliably reported that Corinth Publications intends to republish "Shame Agent" and "Lust

Pool", the republished version to show the imprimature of this Court on that subject matter.

Logically, this result cannot follow since *Ginzburg* is still ruling precedent, for were one to place "Spree" and "High Heels" alongside "Eros Vol. 1 No. 4", it would defy reason to hold the former to be protected materials *under all circumstances, w*hereas the latter is not. More in point, were the Commonwealth of Kentucky to undertake a prosecution against the publisher of "Spree", for causing "Spree" to be sent into the Commonwealth of Kentucky for sale and distribution, it surely could not legitimately be argued that the rationale expressed in the *Redrup-Austin-Gent per curiam* opinion would under all circumstances bar an action against him as to the subject matter in this case. *Ginzburg v. U.S.* (*supra*).[3]

Unfortunately, however, when this Court in its *per curiam* opinion concluded:

> "Whichever of these constitutional views is brought to bear upon the *cases* before us, it is clear that the judgments cannot stand." (Our emphasis.)

the author failed to emphasize (as we have above) that the Court was considering "cases" which were qualified by specified factual situations and was not considering the "subject matter" in vacuo. Nor did this Court take the precaution to raise the caveat expressed by Justice Brennan in "A Book Named Memoirs of a Woman of

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[3]Perhaps this Court will clear up some of this confusion in its ruling in Keney v. N.Y., No. 2, Oct. Term 1966 where the *proprietor* of paperback books almost identical to "Lust Pool" and "Shame Agent" indicated to undercover police officers, in promotion that his books were "hot books" and "spicy books".

Pleasure vs. Attorney General", 16 L. Ed. 2d 1, 6, to the effect that "It does not necessarily follow from this reversal that a determination that Memoirs is obscene in the constitutional sense would be improper under all circumstances."

It would appear from the brief discussion noted above, that, viewed in its most favorable light, the opinion is ambiguous, and if allowed to stand unmodified or unqualified, will bring complete confusion to the law and gives promise of destroying the sanity which came into the law in the *Ginzburg-Mishkin* cases.

III.

Whether or Not "Spree" and "High Heels" Are Obscene Is a Question of Fact for the Jury's Determination.

A. *Obscenity Is Primarily a Question of Fact for the Jury's Determination.*

Certainly the Roth Court followed this traditional approach as laid down by Judge Hand in *United States v. Kennerley,* 209 Fed. 119 (1913) and consistently followed by other courts in subsequent cases. *United States v. Levine,* 83 F. 2d 156, 157, cited in *Roth* at footnote 26. *People v. Noroff,* 58 Cal. Rptr. 172, 175 (April 13, 1967). Roth involved such a jury trial. Justice Brennan, speaking for a majority of the Court, cited with approval the following jury instruction given in *Roth,* reflecting this time-honored right of the jury, at page 490:

> "In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children."

Until this Court's decision on May 8th in Austin, Justice Brennan gave what appeared to be sincere recognition to this tradition. In his dissenting opinion in *Kingsley Book, Inc. v. Brown* (1957), 354 U.S. 436, he said:

> "In Alberts v. California, and Roth v. U.S., decided today, 1 L ed 2d 1498, the court held to be constitutional the following standard for judging obscenity—whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. *The statutes there involved allowed a jury trial of right, and we did not reach the question whether the safeguards necessary for securing the freedoms of speech and press for material not obscene included a jury determination of obscenity.*
>
> "*The jury represents a cross-section of the community and has a special aptitude for reflecting the views of the average person.* Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity *which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards.* A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene. *Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, i.e.,* that reasonable men may differ whether the material is obscene." (Our emphasis.)

As late as June 1964, Chief Justice Warren indicated his accordance. See his opinion dissenting in *Jacobellis v. Ohio,* 378 U.S. 184, 200, 202. To the Chief Justice, the community was the local community, the constitutional standard was not fixed at hard-core pornography and the standard of review was that of "sufficient evidence"—requiring something more than merely any evidence but something less than "substantial evidence" on the record (including the allegedly obscene material) as a whole.

At one time Justice Stewart acknowledged this tradition. Writing the majority opinion in *Volanski v. U.S.,* 246 F. 2d 842, 845 (June 7, 1957), he voted to reverse an obscenity conviction after court trial, and to remand the same for a new trial "preferably by a jury". Concerning the function of judge and jury, he said at page 845:

> "The question in our opinion is peculiarly one best left for nisi prius determination, preferably by a jury. . . . 'The problem is to find a passable compromise between opposing interests, whose relative importance like that of all social or personal values, is incommensurable. We impose such a duty upon a jury. . . .' U.S. v. Levine, 2 Cir. 1936, 83 F.2d 156, 157. A trial court can best determine 'the present critical point in the compromise between candor and shame at which the community may have arrived here and now.' A trial court, particularly with the aid of a jury, can best determine 'the average conscience of the time.' U.S. v. Kennerley, DCSDNY, 1913, 209 F. 119, 121."

His was the deciding vote which sent Volanski back for a jury trial. In the *Volanski* case Justice Stewart

was talking about material which he described at page 843 as:

> "Each set of the pictures in question consists of twelve photographs of a young woman in various poses and various stages of undress. In none of the frontal views is the subject totally unclothed below her waist. In some of the posterior views she is. The photographs are without even tenuous pretentions to artistic or scientific merit. They are unaccompanied by any text. Although some of the poses are rather bizarre, no subject is shown engaged in any indecent or immoral activity. . . ."

The resemblance of the *Volanski* material to the "Spree" and "High Heels" material is clear.

Even Justice Black, at times, seemed to acknowledge this principle—though reluctantly (see footnote[4]).

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[4]In modern American terms, the traditional and characteristic function of the jury is expressed in Windolph's "The Country Line" (1958) as:

> "Its underlying principle is that the sanctity of law arises not from the fist of any potentate, however benevolent, nor from the vote of any majority, however enlightened, but from the common judgment and consent of the whole body of the people. . . . In other words, no consideration of trial by jury can be adequate which ignores its political and *legislative* significance, and seeks to reduce it to the mere method of finding facts which the passion for logic of judges and lawyers has tried to make it." (Our emphasis.)

During the arguments in the *Fanny Hill* case on December 7, 1965, Justice Black interrogated the Deputy Attorney General of Massachusetts on this point:

> "Mr. Justice Black: Let's get to the core of it. The core of the test is to arouse or stimulate a prurient interest. Who are the experts in that field? . . ."
>
> "Mr. Justice Black: You recognize that that is a test in the Roth case? . . ."
>
> "Mr. Justice Black: I understand that, but you are discussing the question now basically.

It is submitted that a departure from this tradition will place this Court in the unfavorable light occupied by the early American courts at the time of Peter Zenger's trial. In that governmental struggle, the American judiciary fought to retain control of the libel determination.[5] If the May 8th decisions are to stand in their present form history will record this Court as having gone on record as assuming control of the obscenity determination,[6] *for the subject matter in "Spree" and "High Heels" permits no other evaluation.*

"Mr. Cowin: Your Honor, I believe that would put the books into the hands of a more or less legislative determination as to what the community wants or does not want.

"Mr. Justice Black: Maybe that is where it should be, in the legislative branch, if the states have the power to suppress books they consider obscene. . . ."

[5]Clark Gavin, Famous Libel and Slander Cases of History, First Collier Books Edition 1962, New York, N.Y., pages 39 to 62, original copyright 1950 as Foul, False and Infamous.

[6]On this role, Justice Black said in *Kingsley Book v. Regents of the University of New York*, 360 U.S. 684, 690:

"If despite the Constitution, however, this Nation is to embark on the dangerous road of censorship, my belief is that this Court is about the most inappropriate Supreme Board of Censors that could be found. So far as I know, judges possess no special expertise providing exceptional competency to set standards and to supervise the private morals of the Nation. In addition, the Justices of this Court seem especially unsuited to make the kind of value judgment—as to what movies are good or bad for local communities—which the concurring opinions appear to require. We are told that the only way we can decide whether a State or municipality can constitutionally bar movies is for this Court to view and appraise each movie on a case by case basis. Under these circumstances, every member of the Court must exercise his own judgment as to how bad a picture is, a judgment which is ultimately based at least in large part on his own standard of what is immoral. The end result of such decisions seems to me to be a purely personal deliberation by individual Justices as to whether a particular picture viewed is too bad to allow it to be seen by the public. . . ."

In the Bill of Rights, Justice Learned Hand warns the judiciary against assuming the role of "Platonic Guardians".[7]

> "Moreover, it certainly does not accord with the underlying presuppositions of popular government to vest in a chamber, unaccountable to anyone but itself, the power to suppress social experiments which it does not approve. Nothing, I submit, could warrant such a censorship except a code of paramount law that not only measured the scope of legislative authority but regulated how it should be exercised."

B. *Insofar as Obscenity May Involve a Mixed Question of Law and Fact, This Court Has a Proper Function.*

To say that obscenity is *primarily* a question of fact for the jury is not to suggest, however, that in every instance such is the case. See Justice Brennan dissenting in *Kingsley Book, Inc. v. Brown, supra.* On the contrary, the Court has a proper role, as does the jury system as the fact finder. As the jury may sometimes overstep its bounds, *United States v. Dennett,* 39 F. 2d 564, so also may a lower court, *People of the State of New York v. Birch, et al.,* 269 N.Y.S. 2d 752, 754 (May 2, 1966) reversing Special Term Judge Shapiro's judgment, which dismissed obscenity indictments in 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (Sept. 6, 1963) without trial. We understand this to mean that there are special lines of demarcation which set apart the function of the Court and the function of the jury.

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[7]Learned Hand, The Bill of Rights, Harvard University Press, 1962, at page 73.

In other words, there is a line of demarcation between material which, because of its redeeming social importance, may be protected *as a matter of law, when employed in the market place of ideas for that purpose,* and other material which has no redeeming social purpose and which is either a question of fact for the jury as the finder of fact, or is obscene as a matter of law. See the reporter's comments to the 1957 draft of the American Law Institute Model Penal Code, Section 207.10 at page 16.

When illustrated by way of example, the dividing line of responsibility is brought sharply into focus. When Justice Brennan speaking on this matter for the majority of the Court in Roth said that, "The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press," he cited in explanation at footnote 21 a case, the facts of which, in our view, clearly demonstrate the general area in which the Court *properly* plays its role and, concomitantly, what is not a proper area of responsibility for a jury.

In *United States v. Dennett,* 39 F. 2d 564 (Mar. 3, 1930), cited with approval in *Roth* at footnote 21, *the Circuit Court of Appeals for the Second Circuit reversed a jury verdict* that Mrs. Dennett was guilty of the violation of the postal obscenity statute in mailing a copy of a pamphlet "Sex Side of Life" to a married woman, Mrs. C. A. Miles. Mrs. Dennett, the mother of two boys, had authored and published the pamphlet which was designed to explain the sex function to adolescents. The pamphlet is described in detail in the Circuit Court of Appeals opinion at pages 565-567. In

holding the conduct involved to be entitled to constitutional protection, and not to constitute a proper case for submission to the jury, the court said at page 568:

> "In other words, a publication might be distributed among doctors or nurses or adults in cases where the distribution among small children could not be justified. The fact that the latter might obtain it accidentally or surreptitiously, as they might see some medical books which would not be desirable for them to read, would hardly be sufficient to bar a publication otherwise proper. Here the pamphlet appears to have been mailed to a married woman. The tract may fairly be said to be calculated to aid parents in the instruction of their children in sex matters. As the record stands, it is a reasonable inference that the pamphlet was to be given to children at the discretion of adults and to be distributed through agencies that had the real welfare of the adolescent in view. There is no reason to suppose that it was to be broadcast among children who would have no capacity to understand its general significance. Even the court in Regina v. Hicklin, L.R. 3 Q.B. at p. 357, which laid down a more strict rule than the New York Court of Appeals was inclined to adopt in People v. Eastman, 188 N.Y. 478, 81 N.E. 459, 11 Ann. Cas. 302, said that 'the circumstances of the publication' may determine whether the statute has been violated.
>
> "But the important consideration in this case is . . . the meaning and scope of those words of the statute which prohibit the mailing of an 'obscene, lewd or lascivious. . . .' It was for the trial court

to determine whether the pamphlet could reasonably be thought to be of such a character before submitting any question of the violation of the statute to the jury. Knowles v. U.S. (C.C.A.) 170 F. 409; Magon v. U.S. (C.C.A.) 248 F. 201. And the test most frequently laid down seems to have been whether it would tend to deprave the morals of those into whose hands the publication might fall by suggesting lewd thoughts and exciting sensual desires. Dunlop v. U.S., 165 U.S. at page 501, 17 S. Ct. 375, 41 L.Ed. 799; Rosen v. U.S., 161 U.S. 29, 16 S. Ct. 434, 480, 40 L.Ed. 606. . . .

"We have been referred to no decisions where a truthful exposition of the sex side of life, evidently calculated for instruction and for the explanation of relevant facts, has been held to be obscene. . . .

"The defendant's discussion of the phenomena of sex is written with sincerity of feeling and with an idealization of the marriage relation and sex emotions. We think it tends to rationalize and dignify such emotions rather than to arouse lust. While it may be thought by some that portions of the tract go into unnecessary details that would better have been omitted, it may be fairly answered that the curiosity of many adolescents would not be satisfied without full explanation, and that no more than that is really given. It also may reasonably be thought that accurate information, rather than mystery and curiosity, is better in the long run and is less likely to occasion lascivious thoughts than ignorance and anxiety. Perhaps instruction other than that which the defendant sug-

gests would be better. That is a matter as to which there is bound to be a wide difference of opinion, but, irrespective of this, we hold that an accurate exposition of the relevant facts of the sex side of life in decent language and in manifestly serious and disinterested spirit cannot ordinarily be regarded as obscene. Any incidental tendency to arouse sex impulses which such a pamphlet may perhaps have is apart from and subordinate to its main effect. The tendency can only exist in so far as it is inherent in any sex instruction, and it would seem to be outweighed by the elimination of ignorance, curiosity, and morbid fear. The direct aim and the net result is to promote understanding and self-control.

"No case was made for submission to the jury, and the judgment must also be reversed."

The *Dennett* opinion stands in marked contrast to that of Special Term Justice J. Irwin Shapiro in *People v. Birch, supra,* wherein he said at page 528, in holding the material and conduct there involved not to present a factual question for trial:

"The basic question is whether these books go beyond 'the present critical point in the compromise between candor and shame at which the community has arrived'. . . .

"The books here offer. . . . no 'four letter' words. . . . Fully 90% of each book, however, is filled with lurid descriptions of sexual activities, both hetero and homosexual, in sufficient detail to act as an erotic stimulus to those so inclined. However, in all their erotic descriptions they maintain a clever, and apparently deliberate, avoidance of socially unacceptable language, and the descriptions

of erotic activity are so similar, in language and action, as to appear to be written by one author using one outline for all the books. Even those books which have a stronger plot and story line reflect this outline in the description of the sexual scene. Page after page contains details and descriptions of similar erotic behavior. . . :

"In the opinion of the Court (compelled by statute to act as a literary critic) these books are plain unvarnished trash, but novels and stories of no literary merit have a place in our society. There are those who, because of lack of education, the meanness of their social existence, or mental insufficiency, cannot cope with anything better."

In our view, trial judge Shapior misapplied the obscenity laws and misunderstood the role played by judge and jury in such a case. The Appellate Division of the Supreme Court, Second Department (Brennan, Hill, Rabin, Hopkins and Benjamin) *supra,* in reversing and remitting the matter for trial said as much, at page 754:

". . . we do not agree with the learned Justice at Special Term that these books have sufficient redeeming importance if they furnish escape literature to those who, as he puts it, 'because of lack of education, the meanness of their social existence, or mental insufficiency, cannot cope with anything better.' This much social significance must by definition be inherent in literature which nevertheless has been proscribed by the Supreme Court as 'utterly without redeeming social importance.' "

By analogy and comparison respondent cannot reconcile "Spree" and "High Heels" as presenting a "Dennett" type situation.

C. *"Spree" and "High Heels" Do Not Present an Issue of Law for This Court.*

The weight of evidence (see Point III-D) relegates these publications to the jury classification, no matter how they are "used" (see Point II).

As a "girlie magazine" type "Spree" has in past years been long identified in the reported decisions as being at the bottom of the ladder. See *New Jersey v. Hudson County News Company,* 41 N.J. 247, 196 A. 2d 225, 228, Fn. 2 (Dec. 13, 1963); *Mahon v. Rachleff,* 15 Fla. Supp. 136 (Dec. 17, 1959), aff'd in 124 So. 2d 878 (Nov. 29, 1960); *Comm. Penn. v. Levan,* 52 Berks 160 (Aug. 19, 1960), and *Chobot v. Wisconsin,* 12 Wisc. 2d 110, 106 N.W. 2d 286 (Nov. 29, 1960), appeal dismissed for want of a federal question, 368 U.S. 15 (Oct. 23, 1961), rehearing denied 368 U.S. 936 (Dec. 4, 1961).

Given an opportunity to argue this issue (for the first time) on a rehearing, respondent submits that it will have no difficulty in laying before this Court an overwhelming amount of similar data to the same effect, gleaned from the records of unreported cases in the hands of other law enforcement agencies throughout the Nation. How can this High Court justify its refusal to respond to the moral demands of the separate communities throughout the Nation?

As noted by Justice Harlan in *Alberts,* the interests which the obscenity statutes protect are primarily matters of state concern, for each state is the primary guardian of the moral standards of its citizens. The great strength of our federal system is that we have, in the 50 states, 50 experimental social laboratories. If a mis-

take is encountered in the New York or California jurisdiction in setting the limits too low (as at hardcore pornography) that is something which can be more readily controlled by government in action (with all of its competing forces) within that state. The social experiment in other states goes on undisturbed. Were this error to be made at the federal level, the corrosion would infect each state within the Union with disastrous results. The recovery there is not so easy to come by.

The Kentucky Jurisdiction—the Arkansas jurisdiction—the New York jurisdiction, each should have the power to control the moral destiny of its own communities. No state government should be forced to accept the girlie magazine or books like "Lust Pool" and "Shame Agent" against the express wishes of its citizenry. To hold otherwise is to "censor" the voice of the community and impair its moral development for by its jury verdict in an obscenity trial, the jury is actually "speaking out" in the constitutional sense. (See Point III at p. 14.)

D. *A Ruling That Girlie Magazines Like "Spree" and "High Heels" May Not Be Prohibited by State Action (if Such Is the Impact of the May 8th Decisions) Finds Little Support, Policy-Wise, in the Supreme Courts of Other States Making Up This Union.*

The overwhelming majority of state high courts (8 out of 9) which have ruled on cases involving girlie magazines have held them to present a jury question. *Connecticut v. Andrews,* 150 Conn. 92, 186 A. 2d 546 (1962); *Monfred v. Maryland* (*supra*); 226 Md. 312,

173 A. 2d 173, cert. den. 368 U.S. 953 (Jan. 8, 1962); *State v. Chobot* (*supra*); *New Jersey v. Hudson County News Co.*, 41 N.J. 247, 196 A. 2d 225 (1963); *Goldstein v. Virginia* (unreported); cert. denied 372 U.S. 910 (Feb. 18, 1963); *Kentucky v. Austin*, 386 S.W. 2d 270 (Jan. 22, 1965); *Gent v. Arkansas*, 393 S.W. 2d 219 (May 24, 1965); *Louisiana v. Percy Henry*, ... La. ...., ...So. 2d .... (May 1, 1967) and *City of Hammond v. Glen Connors*, writ of certiorari and review refused in .... La. .... (Mar. 27, 1967) *Cf. People v. Richmond County News Co., Inc.*, 9 N.Y. 2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681 (1961).

In New York, the only state to hold to the contrary, the result was not convincing. In the *Richmond County News* case (*supra*), the New York Court of Appeals, after a fact-finding by three judges at the trial level and five judges in the appellate division, that the so-called girlie magazine "Gent" (April, 1967) was obscene, reversed in a 4-to-3 decision a judgment of conviction against Richmond County News Company, the local distributor of "Gent" magazine in Richmond County. The majority of four could not agree on the reasoning and cast two separate opinions on the reversal. Justices Fuld and Van Voorhis agreed that the test for New York "obscenity" required more (hardcore pornography) than the test for constitutional "obscenity" of Roth-Alberts. Justices Desmond and Dye agreed that the material was offensive but considered themselves restrained by Roth-Alberts (inferentially that Roth-Alberts required hardcore pornography). Justice Froessel joined by Burke and Foster in a strong 4-page dissent took issue with the majority for adopting a far more stringent test than was required under the present constitutional standard.

Even "Gent", commonly refetred to as the less innocuous "N.Y." girlie type magazine is clearly distinguishable from the subject matter herein. "Spree" and "High Heels" which contain no camouflaging—being 100% an appeal to prurient interest.

The second case to be considered in New York, *Larkin v. G. I. Distributors, Inc.*, 14 N.Y. 2d 869, 252 N.Y.S. 2d 81 (June 10, 1964), involved six of the early California variety: American Art Agency, Inc. (Luros) magazines, Cocktail, Vol. 2, No. 1 (January 1961); Tonight, Vol. 1, No. 5 (November 1960); Show Case, Vol. 1, No. 1 (October 1960); Snap, Vol. 1, No. 7 (December 1960); Touch, Vol. 1, No. 7 (October 1960); Tonight, Vol. 1, No. 5 (November 1960), and a local distributor in the State of New York. In this case Justice Desmond changed his mind and voted them obscene under New York's obscenity statute, undoubtedly because of the difference in nature between "Gent" and the California type girlie magazine. The final result, however, was the same as in the "Gent" case (4-3). A few months before the decision, Justice Bergen replaced Justice Foster and Bergen voted contrary to Foster's vote in the *Gent* case. Dye, Fuld, Van Voorhis and Bergen voted with the majority and Desmond, Burke and Scileppi dissented.

An interesting fact went unnoticed by the prosecutor in the G.I. Distributors' case (which was tried in an injunction proceedings. One of the very magazines under consideration, Touch, Vol. 1, No. 7, was the identical magazine involved in a New Jersey conspiracy conviction and *in that case, the publisher itself had pleaded guilty to the charge.*

One young law student (female) made an astute observation, after considering these results: "How can the subject matter under such divergent thinking be other than a jury question?"

A point which bears emphasis is that made by Justice Fuld in the *Richmond County News* case (*supra*). It was within the power of these state justices in formulating state public policy, to set a standard for the state lower than the common denominator of Roth —that is, to hold girlie magazines protected by state law, though proscribable by the Federal Constitution. This position, however, had only two advocates (Fuld and Van Voorhis) among the Supreme Court Justices of the nine state supreme courts which considered the matter.

IV.

The Statement in the Per Curiam Decision That "in None of the Cases . . . Was There Evidence of the Sort of "Pandering" Which the Court Found Significant in Ginzberg v. U.S., 383 U.S. 463" Is Not Supported by the Record.

While it is true that *Ginzburg's* efforts were exceedingly vocal, at no time did he consider himself as operating outside the law. See *Ginzburg v. United States,* at footnote 9. Nor do we understand Ginzburg to say that proof of pandering must come solely from confessions, admissions against interest, and the like, for as stated by the Connecticut Supreme Court in *Conn. v. Sul,* 146 Conn. 78, 87, 147 A. 2d 686:

> "Knowledge by a book seller of the obscene or indecent character of the magazines possessed by him *can ordinarily be proved only by circumstantial evidence.*" (Our emphasis.)

We understand the business of pandering to be as defined by this Court in *Ginzburg* as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. . . ." The overwhelming weight of appellate courts and juries which have considered the girlie magazine commodity has placed it within that classification. (See Point III-D.) Certainly the format and content of the girlie magazines "Spree" and "High Heels" fit that description.

The evidence is clear that the Paducah community, like the overwhelming majority of other communities in the United States, resented and objected to the appellant's selling girlie magazines and that this fact was brought home to appellant [R. 22-24, 41]. See *Louisiana v. Henry,* ..... La. ..... (May 1, 1967.) It was not a "sometime thing" with appellant—he carried a full line of titles, estimated as being between 25-30. [R. 41.] That it was the community's judgment as a whole and not a particular pressure group has been established beyond dispute by the two jury verdicts to that effect. Compare *Bantam Books Inc. v. Sullivan,* 372 U.S. 58. *Blankenship v. Holding* and *Holding v. Blankenship,* decided by this court May 15, 1967. Any *innuendo* to the contrary in the opinion is not supported by the record.

The covers of the girlie magazines showing pictures of nude or semi-nude females together with the titles of the various issues proclaim the nature of the publications and give notice of the character of the material. *Louisiana v. Henry,* ..... La. ..... (May 1, 1967). No one glancing at the prominent display represented by petitioner's Exhibits 2 and 3 could help be unaware

of the pandering nature of the publications (their interest to prurient interest) and the community had a right to resent it. We consider this latter an assault on public morals which this Court has not considered in treating the philosophy behind the obscenity laws.

It has been held by the highest state courts of several jurisdictions that in regard to obscene girlie magazines or nudist magazines proof of scienter may be found in the covers bearing photographs of nude or semi-nude women so that even the most casual observation or cursory examination could not fail to acquaint the seller with the nature of the contents and character of the material. See *State v. Chobot*, 12 Wisc. 2d 110, 106 N.W. 2d 286 at 291, 292 (1960) involving four girlie magazines, including "Spree". Appeal dismissed for want of a substantial federal question, *Chobot v. Wisc.*, 368 U.S. 15; *State v. Hudson County News Co.*, 41 N.J. 247, 196 A. 2d 225 at 230 (1963) involving five girlie magazines, including "Spree"; *State v. Andrews*, 150 Conn. 92, 186 A. 2d 546 at 552 (1962), involving two girlie magazines *Chicago v. Doe*, 47 Ill. App. 2d 460, 197 N.E. 2d 711 at 715 (1964), involving a girlie magazine; *Nebraska v. Jungclaus*, 176 Neb. 641, 126 N.W. 2d 858 at 862 (1964), three nudist magazines; *Missouri v. Vollmar*, 389 S.W. 2d 20 at 29 (1965), eight nudist magazines. *Lousiana v. Henry*, ... La. ....., May 1, 1967, 11 Girlie magazines. Significant evidence of scienter consisting of "the transparency of the character of the material in question, highlighted by

the titles, covers, and illustrations" was noted by Justice Brennan in *Mishkin v. N.Y.*, 383 U.S. 502.

Petitioner's protestation that he did not know that "Spree" and "High Heels" were in the shop did not establish that fact as a matter of law—it was an issue for the jury to weigh in the light of all of the evidence, including that noted above. See *Louisiana v. Henry*, ... La. ....., May 1, 1967.

The circumstantial evidence in the *Redrup* case was just as strong, but of a different nature. In *People v. Weingarten*, 50 Misc. 2d 635, 271 N.Y.S. 2d 158 (June 13, 1966), trial judge Amos S. Basel found the defendant guilty of selling an obscene paperback book "Flesh Worshippers" at 251 West 42nd Street. The judge noted at page 640 that, "Finkelstein who was convicted owned a book shop at 251 West 42nd Street." Two of the shops involved in *Mishkin v. N.Y.*, 383 U.S. 502 (March 21, 1966) were located at 254 West 42nd Street (Publishers Outlet) and 228 West 42nd Street (Midget Book Shop). It would appear that a trial judge and the New York Court of Appeals could take judicial notice of those activities which have acquired a local, even national reputation (like Main Street, Los Angeles, Baltimore St., Baltimore, and 42nd St., New York City). See New York Journal American, October 29, 1963: "The lights were bright early today on 42nd Street between Broadway and Sixth Avenue—one of the seediest strips of real estate in town. The assignment was to see what kind of smut

material could be found in the area. The material was there—and so were the stores. They're not hard to find. There were six on 42nd Street strip—two more in the subway—and many were still open at 2:30 A.M. Most of the places looked the same. They were sooty and there was provocative calendar art on the walls—nudes and semi-nudes—with salacious type jackets and titles lining the stalls."

The *Arkansas* case, involving an injunction, *and a limited record* does not permit an analysis and comparison.

CONCLUSION.

Respondent, in seeking a hearing and argument on the obscenity vel non issue in this petition for rehearing, is at a disadvantage not faced by appellant when he sought a hearing and oral argument on the same issue. There, four votes were needed to grant certiorari. Supreme Court Practice, Stern and Gressman, page 174. Here, a majority vote of the Court is needed. Rule 58 of the Revised Rules of the Supreme Court of the United States. See also, Supreme Court Practice, Stern and Gressman, Sect. 13-6, at page 385.

It would appear, however, that the unusual manner in which this case was decided (as reflected by the majority and dissenting opinions), indicative of a degree of unfairness to petitioner in not permitting argument on the issue upon which the case was decided, the ambiguities presented by the language of the majority opinion and the consequences which will flow there-

from, as more fully noted in the above arguments, warrant this Court's granting a hearing on the obscenity vel non issue on this petition and setting the matter for further argument during the next term. This Court followed just such a procedure in *Time v. Hill,* 384 U.S. 995, reargued on October 18 and 19, 1966.

The procedure followed by this Court in *Ohio v. Jacobellis,* 373 U.S. 901, reargued on April 1, 1964, is precedent for authorizing reargument on the issues involving scienter, presented in the original grant of certiorari.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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